



DEPARTMENT OF THE TREASURY
WASHINGTON, D.C. 20220

Procurement
Instruction
Memorandum
No. 98-05
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MEMORANDUM FOR: BUREAU CHIEF PROCUREMENT OFFICERS

FROM: Annelie M. Kuhn, Acting Director *An M Kuhn*
Office of Procurement

SUBJECT: Personal Services Contractors and Repayment of Buyouts

We have been notified by the Office of Personnel Policy that Congress has enacted several buyout laws since 1992 which permit agencies to minimize the negative impact of downsizing efforts by offering Voluntary Separation Incentive Payments (VSIPs), also known as buyouts. Most of these laws also require that the VSIP be repaid to the agency which issued it, if an individual who received a VSIP is rehired by a Federal agency through a *personal* service contract within five years after the date of the separation on which the VSIP was based.

Consequently, the Office of Personnel Policy has requested that Treasury procurement offices obtain certain information from prospective contractor employees, prior to hiring them, in order to ensure compliance with the laws governing the repayment of VSIPs. To assist with this requirement, information is attached that provides a certification that should be included in all solicitations for personal service contracts, and information concerning the law and the definition of a personal services contract.

If the selected offeror submits an affirmative certification, it will be the responsibility of the procurement office to work with the appropriate finance/budget offices to ensure that payment is made, prior to awarding the contract. When a buyout taker returns to work and triggers the repayment requirement under P.L. 103-226, the agency from which the employee separated with the incentive is the agency that receives the repayment. Agencies should coordinate efforts to collect the repayment. DOD buyout takers who accept employment under a personal services contract are NOT required to repay the buyout, as other non-Defense employees would (See P.L. 103-266, Section 3(d)(3)).

Any questions may be addressed to Terri Toplisek on (202) 622-1241.

Attachment

GUIDANCE FOR PROCUREMENT OFFICES

COMPLIANCE WITH REPAYMENT REQUIREMENTS UPON EMPLOYMENT OF PERSONAL SERVICES CONTRACTORS WHO HAVE RECEIVED VOLUNTARY SEPARATION INCENTIVE PAYMENTS

BACKGROUND

A variety of laws pertaining to voluntary separation incentive payments (VSIP's), also known as buyouts, have been passed since 1992. These laws permitted agencies to minimize the negative impact of downsizing efforts by offering VSIP's to employees in lieu of involuntary separations due to reduction-in-force and similar actions.

Most of these laws also require that the VSIP be repaid to the agency which issued it, if an individual who received a VSIP is re-hired by a Federal agency through a personal services contract (PSC) within five years after the date of the separation on which the VSIP was based.

GUIDANCE

Attachment 1 is a form which was developed for use in the "pre-employment" process and describes the laws governing VSIP's and repayment provisions. This form is intended to assist both procurement offices and candidates for PSC's in determining when repayment provisions apply. In all but one of the cases involving repayment, the VSIP must be repaid **prior** to the individual's first day of employment. In the case where repayment is not required prior to employment, the repayment may be made through debt collection procedures after employment begins.

The information discussed below is designed to assist procurement offices in defining a personal services contract and to ensure compliance with the repayment provisions of the laws governing VSIP's. This information was excerpted from U.S. Office of Personnel Management, Workforce Restructuring Office, March 1996 guidance to agencies titled, "Reemployment, Personal Services Contracts and the Repayment of Voluntary Separation Incentives."

Defining A Personal Services Contract

A personal services contract is described in 48 CFR 37.101 as:

"...a contract that, by its express terms or as administered, makes the contractor personnel appear, in effect, Government employees."

48 CFR 37.104(a) and (c) further describe a personal services contract as one which is:

"characterized by the employer-employee relationship it creates between the Government and the contractor's personnel." An employer-employee

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relationship exists when: “contractor personnel are subject to the relatively continuous supervision and control of a Government officer or employee.”

The key question which must be asked in making a determination as to whether or not a contract is for personal services is:

“Will the Government exercise relatively continuous supervision and control over the contractor personnel performing the contract?”
[48 CFR 37.104(c)(2)]

The following should be used as a guide, according to 48 CFR 37.104(d), in determining whether or not a contract is personal in nature:

- (1) Performance on site
- (2) Principal tools and equipment furnished by the Government
- (3) Services are applied directly to the integral effort of agencies or an organizational subpart in furtherance of assigned functions or mission.
- (4) Comparable services, meeting comparable needs, are performed in the same or similar agencies using civil service personnel.
- (5) The need for the type of service provided can reasonably be expected to last beyond one year.
- (6) The inherent nature of the service, or the manner in which it is provided, reasonably requires directly or indirectly, Government direction or supervision of contractor employees to retain control of the function involved; or retain full personal responsibility for the function supported in a duly authorized Federal officer or employee.

It is critical to note the following:

“Each contract arrangement must be judged in the light of its own facts and circumstances...” [48 CFR 37.104(c)(2)]

Procurement offices are urged to seek further guidance from their Chief Counsel’s office when considering whether a former Federal employee who has taken a buyout is indeed engaged in an arrangement which constitutes a personal services contract.

NOTE: There is no requirement that a direct contractual agreement must exist between the former employee and the agency to constitute a “personal services contract.” The definition of personal services contract in 48 CFR 37.101 and 37.104 states that “personal services contract means a contract that, by its express terms *or* as administered, makes the contractor personnel appear, in effect, Government employees” (emphasis added). Further, “a personal services contract is characterized by the employer-employee relationship it creates between the Government and the contractor’s *personnel*” (emphasis added). Thus, agencies should not assume that there must be a written contract between the employee and the agency in order to constitute a personal services contract.

VSIP AUTHORITIES

1. **Authority:** P.L. 102-484, National Defense Authorization Act for Fiscal Year 1992, dated 10/23/92; or, 5 U.S.C. 5597.
Duration: 10/23/92 through 9/30/99
Repayment: None
Waiver: Not Applicable
2. **Authority:** P.L. 103-226, Federal Workforce Restructuring Act, dated 3/30/94
Duration: either 3/30/94 through 3/31/95 or **delayed** VSIP's through 3/31/97
Repayment: If rehired by the Federal government within 5 years after the date of the separation on which the VSIP was based, then the entire amount of the VSIP must be repaid to the agency which issued it. Repayment may be made after the employee is rehired as provided in 5 U.S.C. 5514 and, as implemented, in 5 CFR 550 Subpart K, Collection by Offset from Indebted Government Employees.
Waiver: No waivers are permitted under this authority.
3. **Authority:** P.L. 104-208, Section 633, Treasury, Postal Service, and General Government Appropriations Act for Fiscal Year 1997, dated 9/30/96
Duration: 10/1/96 through 12/30/97
Repayment: If rehired by the Federal government within 5 years after the date of the separation on which the VSIP was based, then the entire amount of the VSIP must be repaid to the agency which issued it, prior to the individual's first day of employment in the rehiring agency.
Waiver: No waivers are permitted under this authority.
4. **Authority:** P.L. 104-134, Section 339, Smithsonian Institution, dated 4/26/96
Duration: 4/26/96 through 10/1/96
Repayment: None
Waiver: Not Applicable
5. **Authority:** P.L. 104-180, Section 735, Department of Agriculture (USDA), dated 8/8/96
Duration: 10/1/96 through 9/30/2000
Repayment: Same as those for P.L. 104-208, #3 above
Waiver: No waivers are permitted under this authority.
6. **Authority:** P.L. 104-190, Section 1, Agency for International Development (AID), dated 8/20/96
Duration: 8/20/96 through 1/31/97
Repayment: Same as those for P.L. 104-208, #3 above
Waiver: No waivers are permitted under this authority.
7. **Authority:** P.L. 104-204, Section 432, National Aeronautics and Space Administration (NASA), dated 9/26/96
Duration: 9/26/96 through 9/30/2000
Repayment: Same as those for P.L. 104-208, #3 above
Waiver: Same as those for P.L. 103-226, #2 above, **except** that the waiver must be approved by the OPM prior to the individual's first day of employment with the rehiring agency.

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VOLUNTARY SEPARATION INCENTIVE PAYMENT INFORMATION

An individual who received a Voluntary Separation Incentive Payment (VSIP) under certain laws is required to repay the VSIP, if hired by a Federal agency through a personal services contract within five years after the date of the separation on which the VSIP was based. To ensure compliance with appropriate laws governing VSIP's, procurement offices must obtain certain information from individuals before hiring them as personal services contractors.

CERTIFICATION

☐ I HAVE NOT RECEIVED A VSIP WITHIN THE LAST FIVE YEARS.

☐ I HAVE RECEIVED A VSIP WITHIN THE LAST FIVE YEARS.

The circumstances under which you received a VSIP should be indicated on your personnel action (SF-50) documenting your separation or retirement from Federal service. It also may be documented in correspondence between you and the agency from which you received the VSIP. The reverse side of this form contains information about individual VSIP authorities to assist you in completing this certification.

Check only one:

- a. ☐ I am a former Department of Defense (DOD) employee who received a VSIP under Public Law (P.L.) 102-484 or Title 5, United States Code, Section 5597 (5 U.S.C. 5597).
- b. ☐ I received a VSIP under P.L. 103-226, Federal Workforce Restructuring Act.
- c. ☐ I received a VSIP under P.L. 104-208, Section 633, Treasury, Postal Service, and General Government Appropriations Act for Fiscal Year 1997.
- d. ☐ I received a VSIP under P.L. _____.

Signature

Date